

NOT TO BE PUBLISHED

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

JAMAR STEVENS,

Defendant and Appellant.

C084962

(Super. Ct. No. 15F07245)

In April 2017, a jury convicted defendant Jamar Stevens of two counts of carjacking (Pen. Code, § 215, subd. (a); counts five and six),¹ two counts of evading a peace officer (Veh. Code, § 2800.2, subd. (a); counts two and seven), discharging a firearm into an inhabited dwelling house (§ 246; count four), discharging a firearm in a grossly negligent manner (§ 246.3; count eight), and being a felon in possession of a firearm (§ 29800, subd. (a); count nine). With respect to the carjacking counts, the jury

¹ Undesignated statutory references are to the Penal Code.

also found true the allegation that defendant personally used a firearm (§ 12022.53, subd. (b)) but found not true that defendant personally discharged a firearm (§ 12022.53, subd. (c)). In separate proceedings, the trial court found true that defendant had two prior prison terms. (§ 667.5, subd. (b).)

On appeal, defendant contends: (1) the trial court erred in imposing a consecutive rather than a stayed sentence on count four (§ 246); (2) the matter should be remanded to permit the trial court to exercise its discretion to strike the firearm enhancements in counts five and six, pursuant to section 12022.53, subdivision (h) (Sen. Bill No. 620 (2017-2018 Reg. Sess.) eff. January 1, 2018 (Stats. 2017, ch. 682, § 2)); and (3) the trial court imposed an unlawful sentence on count eight (§ 246.3).

We conclude substantial evidence supports the consecutive sentence on count four. As to the firearm enhancements, we conclude that on this record, it would be futile to remand the matter to the trial court to exercise its discretion to strike the firearm enhancements. Finally, we will correct the unlawful sentence on count eight. In all other respects, the judgment is affirmed.

FACTUAL AND PROCEDURAL BACKGROUND

At 10:20 p.m. on November 28, 2015, defendant led police on a high-speed chase through residential streets. Defendant eventually stopped and got out of the car, fleeing on foot into a backyard. Police began a yard-to-yard search.

At 10:30 p.m., J. was in his bedroom with his wife D. when he heard a sliding glass door shattering from a gunshot. J., who had undressed to take a shower, heard footsteps and the noise of someone racking a gun. J. unsuccessfully tried to prevent the intruder, whom J. identified as defendant during trial, from entering the bedroom. Defendant pointed his gun at the husband and wife and demanded the keys to their vehicle. J. begged defendant to not shoot, exited the bedroom, and began to walk to the kitchen, where they kept the keys. Defendant followed, continuing to point the gun at J.

When J. showed defendant the keys, defendant grabbed them, left the house, and sped away in the victims' truck, almost hitting a responding police officer who was standing in an intersection. Meanwhile, D. called 911.

The police pursued defendant, who abandoned the truck on the train tracks and fled by foot onto a high school football field. Defendant tried to hide in a concession stand but was unable to open the door, despite shooting at it. Defendant threw his gun onto the roof of the concession stand and ran up a berm, where police arrested him. Police found a magazine for a semiautomatic pistol in his front sweatshirt pocket, and two live rounds fell out when the officer removed the magazine.

At trial, defendant testified he had taken methamphetamine and ecstasy the day of the incident. He tried to evade the police because there was a gun in the car, which he knew he was not supposed to have, and because he previously had "bad runs with the police." Defendant was only trying to "hide and flee from the police" when he entered the victims' house, and the gun went off accidentally when he tried to open the glass door. After defendant went inside, he told the victims he did not want to hurt them and "just want[ed] a ride." The husband offered him the truck so he could run from the police. According to defendant, he never pointed the gun at or threatened the victims.

Defendant testified he ended up at the high school because he was trying to hide from the police. He never pointed the gun at the police. He threw the gun on top of the concession stand, walked to the field, and gave up. Defendant "did not mean to traumatize the victims" and asked for forgiveness. He blamed his actions on the drugs.

In June 2017, the trial court sentenced defendant to prison for an aggregate term of 31 years 4 months, as follows: for count five, the upper term of 9 years plus 10 years for the firearm use enhancement (§§ 215, subd. (a), 12022.53, subd. (b)); for count two, 8

months consecutive (one-third the midterm) (§ 2800.2, subd. (a)); for count four, 1 year 8 months consecutive (one-third the midterm) (§ 246); for count six, 1 year 8 months consecutive (one-third the midterm) plus 3 years 4 months for the firearm use enhancement (§§ 215, subd. (a), 12022.53, subd. (b)); for count seven, 8 months consecutive (one-third the midterm) (§ 2800.2, subd. (a)); for count eight, 1 year 8 months consecutive (one-third the midterm) (§ 246.3); for count nine, 8 months consecutive (one-third the midterm) (§ 29800.2, subd. (a)); and two one-year terms for the prior prison terms (§ 667.5, subd. (a)).

In selecting the upper term for the principal count (count five), the trial court described defendant's crime as "unfathomable" and a "nightmare-ish scenario." The victims were getting ready for bed, placing them in a "vulnerable" and "defenseless position." It was "absolutely meaningless" that the victims had not suffered any physical injury, because "the terror that [defendant] has inflicted will never go away" and was "completely life altering." The trial court continued, "[t]hese sentences do not nearly match the gravity of the wreckage and the ruin [defendant], because of consummate selfishness, has inflicted on [the victims], who still today are so traumatized they couldn't even come down here to witness this event because, as rational people, they want no part of this mess." The crime involved "great violence" and "threat of great bodily harm," "disclosing a high degree of cruelty, viciousness and callousness." Defendant demonstrated a "brazen, violent, horrific mindset," and there was "absolutely no doubt" he was a "serious danger to society." His prior convictions as an adult were "numerous and of increasing seriousness," and he had unsatisfactory prior performance on probation and parole.

The trial court found no circumstances in mitigation. Even if there were mitigating factors, stated the trial court, it would still select the upper term because no mitigating factor "would begin to address the gravity and seriousness of this crime and

the impact on these victims.” In addition, the trial court stated defendant “got a massive sentencing break that he did not deserve” from the jury’s “incomprehensible” failure to find true that defendant personally discharged a firearm during the carjacking. (§ 12022.53, subd. (c).)

In imposing a consecutive sentence on count four (§ 246) and declining to stay the sentence pursuant to section 654, the trial court stated it believed discharging a weapon into an occupied dwelling was a “separate violation.”

Defendant filed a timely appeal.

DISCUSSION

I

Count Four and Section 654

Defendant contends the trial court erred in imposing a consecutive sentence on count four (§ 246), pursuant to section 654. According to defendant, he only shot at the glass door of the victims’ home in order to gain access to the house to complete his objective of securing a vehicle. We disagree.

Section 654 precludes multiple punishments for a single physical act that violates different provisions of law (*People v. Jones* (2012) 54 Cal.4th 350, 358) as well as multiple punishments for an indivisible course of conduct that violates more than one criminal statute (*People v. Correa* (2012) 54 Cal.4th 331, 336). “Whether a course of criminal conduct is divisible . . . depends on the intent and objective of the actor.” (*People v. Alford* (2010) 180 Cal.App.4th 1463, 1467.) The application of section 654 in a given case “is a question of fact for the trial court, which is vested with broad latitude in making its determination.” (*People v. Jones* (2002) 103 Cal.App.4th 1139, 1143.) If the trial court determines section 654 applies, it must impose sentence and stay execution on every affected count. (*Alford*, at pp. 1467, 1469.)

Substantial evidence supports the trial court's implicit determination that defendant exhibited different intents when shooting at the victim's glass door and taking the truck. Defendant testified he was only trying to hide from the police when he entered the home, and the gun went off accidentally when he tried to open the glass door. Thus, the interpretation of separate intents of the two actions is supported by defendant's own testimony about his intent. During closing argument, defense counsel argued that the shot fired into the house was not part of the carjacking, but was to get into the house to hide from the police.

On this record, we conclude the trial court did not err in imposing consecutive sentences on count four.

II

Firearm Enhancements on Counts Five and Six

Senate Bill No. 620, which went into effect on January 1, 2018 (Stats. 2017, ch. 682, § 2), amends section 12022.53 to remove the mandatory firearm enhancement and grant the trial court discretion pursuant to section 1385 to strike or dismiss an enhancement. "The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law." (§ 12022.53, subd. (h).)

At issue is whether the amendments to section 12022.53, potentially providing for lesser punishment, are retroactive to cases not yet final. (See *In re Estrada* (1965) 63 Cal.2d 740; *People v. Francis* (1969) 71 Cal.2d 66, 75-76.) In *People v. Woods* (2018) 19 Cal.App.5th 1080, at page 1091, this court explained: "because there is nothing in the amendment to suggest any legislative intent that the amendment would apply prospectively only, we must presume that the Legislature intended the amendment

to apply to every case to which it constitutionally could apply.” (Accord *People v. Robbins* (2018) 19 Cal.App.5th 660, 679.) As both parties acknowledge, since defendant’s conviction was still on appeal and therefore not yet final, the amended section 12022.53 applies to his case.

Defendant asserts this case must be remanded to the trial court to permit the court to exercise its newly authorized discretion to strike the firearm enhancements. The People contend remanding for resentencing in this case would be futile and not appropriate, given the trial court’s imposition of the upper term on the principal count and strong comments during sentencing.

“ ‘Defendants are entitled to sentencing decisions made in the exercise of the “informed discretion” of the sentencing court. [Citations.] A court which is unaware of the scope of its discretionary powers can no more exercise that “informed discretion” than one whose sentence is or may have been based on misinformation regarding a material aspect of a defendant’s record.’ [Citation.] In such circumstances, we have held that the appropriate remedy is to remand for resentencing unless the record ‘clearly indicate[s]’ that the trial court would have reached the same conclusion ‘even if it had been aware that it had such discretion.’ ” (*People v. Gutierrez* (2014) 58 Cal.4th 1354, 1391.)

In *People v. Gutierrez* (1996) 48 Cal.App.4th 1894, at page 1896 the appellate court refused to remand to allow the trial court to determine whether to dismiss a strike under section 1385, reasoning that, “[u]nder the circumstances, no purpose would be served in remanding for reconsideration.” The trial court had stated the maximum sentence was appropriate, especially since defendant “is the kind of individual the law was intended to keep off the street as long as possible.” (*Gutierrez*, at p. 1896.) As such, reasoned the appellate court, the trial court had “indicated that it would not, in any event, have exercised its discretion to lessen the sentence.” (*Ibid.*; see also *People v. Chavez*

(2018) 22 Cal.App.5th 663, 713-714 [absent a clear indication by the trial court that it would not have exercised discretion to strike or dismiss a firearm enhancement even if it had the discretion to do so at sentencing, the appropriate remedy is to remand for resentencing to allow the trial court to consider whether to exercise its discretion to strike it].)

Here, the trial court imposed the upper term on the principal offense (count four). Although there is no sentencing triad under section 12022.53, subdivision (b), the record clearly indicates the trial court was disinclined to afford defendant any leniency. The court described defendant as having a “brazen, violent, horrific mindset,” and there was “absolutely no doubt” defendant was a “serious danger to society.” His crime was “unfathomable” and a “nightmare-ish scenario” with vulnerable victims, and there were no mitigating factors. While we do not condone the trial court’s consideration during sentencing of what it described as a “massive sentencing break” due to the jury’s “incomprehensible” acquittal of the firearm discharge enhancement (§ 12022.53, subd. (c)), we note the trial court stated it would impose the upper term for the principal count because no mitigating factor “would begin to address the gravity and seriousness of this crime and the impact on these victims.” In sum, the trial court concluded, defendant’s sentence “do[es] not nearly match the gravity of the wreckage and the ruin” defendant inflicted. Based on the sentences imposed and the trial court’s comments during sentencing, we conclude remanding the matter for the trial court to consider whether to exercise its discretion to strike the section 12022.53 enhancements would be futile.

III

Sentencing Error on Count Eight

In imposing sentence on count eight, both parties agree the trial court should have imposed one third the mid-term for the violation of section 246.3. The mid-term of

section 246.3 is two years. (§ 1170, subd. (h).) Thus, the trial court should have imposed eight months on count eight, rather than one year eight months. In the interest of judicial economy, we shall modify the sentence. (*People v. Sanders* (2012) 55 Cal.4th 731, 743, fn. 13 [“it is well established that the appellate court can correct a legal error resulting in an unauthorized sentence . . . at any time”].)

DISPOSITION

The judgment is modified to reflect an eight-month sentence on count eight. The trial court shall prepare an amended abstract of judgment and forward a certified copy to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

_____/s/
HOCH, J.

We concur:

_____/s/
HULL, Acting P. J.

_____/s/
DUARTE, J.